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No. 90-1562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

S.J. GROVES & SONS COMPANY
and
JASPER CONSTRUCTION COMPANY,
Petitioners,
v.
FULTON COUNTY, GEORGIA,
Respondent.

BRIEF OF *AMICUS CURIAE* ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

The Associated General Contractors of America, Inc. is a national trade association of approximately 33,000 firms, including 8,000 general contracting companies throughout the United States. Implementation of race-based contracting preferences and set-aside programs directly affects the members of this organization. The preference that is the subject of the present petition for writ of certiorari is a case in point. Associated General Contractors of America, Inc. has participated as *amicus curiae* in court proceedings challenging preference programs when, as here, they overstep constitutional bounds. All parties have consented to the filing of this brief.

REASONS FOR GRANTING THE WRIT

This case squarely presents the important question whether the Court's decision last term in *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. ____, 110 S. Ct. 2997 (1990), approving "mid-level" review of congressionally mandated race preferences in the award of radio and television licenses, extends to a race preference promulgated by a federal agency, and implemented by state and county recipients of federal funds, in the award of construction contracts. The question merits the Court's attention in light of the approximately 2 billion dollars of federal funding expended each year pursuant to such preferences, and the confusion which the Court's decision in *Metro Broadcasting* has engendered.

Background Statement

In 1982, Fulton County, Georgia, required bidders on an airport runway resurfacing project, ninety per cent financed with a Federal Aviation Administration ("FAA") grant, to exert "best efforts" to allot twenty percent of contract dollars

to minority business enterprises ("MBE").[1] The twenty percent requirement was set by the County in response to federal regulations requiring, as a condition of an FAA grant, that recipients adopt "affirmative action" techniques, including a participation goal set by the recipient, to enhance minority participation in the funded construction. 49 C.F.R. § 23.1 *et seq.* Here the twenty percent goal was carried over by the County from its MBE participation goal applicable to non-federally funded construction programs.[2] The federal regulation also provides that any bidder not meeting the percentage goal must satisfy the recipient that it employed "good faith efforts" to meet the goal. *Id.* § 23.45(h).

Petitioner submitted the lowest dollar bid for the resurfacing project ($818,432.40) with a proposed MBE participation level of 4.5 percent, but Fulton County awarded the contract to the next lowest bidder, which had proposed sixteen percent MBE participation, on the ground that petitioner, unlike the bidder chosen, did not utilize best efforts to maximize MBE participation.[3] Petitioner challenged the denial on various grounds, including that the MBE program violated Georgia's low-bid statute and the Equal Protection clause of the Fourteenth Amendment. The district court held

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[1] "Minority" is defined to include Black, Hispanic, Portuguese, Asian American, American Indian and Alaskan Native citizens or lawful permanent residents of the United States, as well as members of other groups found to be economically and socially disadvantaged by the Small Business Administration under section 8(a) of the Small Business Act, as amended, 15 U.S.C. § 637(a). 49 C.F.R. § 23.5 (1990).

[2] The District Court found that the numbers selected by the County "were based upon the availability of MBEs in the area, taking into account prior successes with MBE programs, including those of the city of Atlanta, and the Metropolitan Atlanta Rapid Transit Authority. . . . " App. 3c.

[3] Petitioner's defense was that it should have been exempt from the subcontracting requirement since it did not need to hire subcontractors because it owned its own asphalt plant and trucks, the heart of the paving contract. App. 4c. It also claimed it had used its best efforts to include MBE's. *Id.*

that Georgia's low-bid statute did not authorize the MBE program, and that the state statute was not preempted by federal law because the federal MBE regulations violated the Constitution. *S.J. Groves & Sons Co. v. Fulton County*, 696 F. Supp. 1480, 1495 (N.D. Ga. 1987) (App. 1b).

The Eleventh Circuit reversed. *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 767 (11th Cir. 1991) (App. 1a). Agreeing with the district court that the 1982 MBE program violated Georgia's low-bid statute (*id.* at 761-763), the Court observed that the County's preemption defense would stand only if the MBE program passed constitutional muster. *Id.* at 763. This question involved three separate inquiries. First, citing *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980), the Court determined that Congress was authorized to enact the program embodied in the Department of Transportation ("DOT") regulations. *Id.* at 764. Second, the Court decided that the DOT was authorized by Section 30 of the Airport and Airway Development Act of 1970 ("AADA"), 49 U.S.C. App. § 2219, to create the program.[4] *Id.* Finally, the Court addressed the appropriate standard by which to evaluate the constitutional validity of the DOT regulations. Acknowledging that the issue "is hardly free of doubt" (*id.*, 920 F.2d at 766), the court decided that this Court's decision last term in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. ____, 110 S.Ct. 2997, *reh'g denied*, ____ U.S. ____, 111 S.Ct. 15 (1990) required that "intermediate" rather than "strict" scrutiny of

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[4] The section reads:

> The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this chapter. The Secretary shall promulgate such rules as the Secretary deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under Title VI of the Civil Rights Act of 1964.

the MBE program be applied on the ground that Congress "authorized the program's creation."[5]

Discussion

A. The Court's *Metro Broadcasting* Decision Does Not Authorize "Mid-level" Scrutiny Of The Transportation Department's MBE Program

The Eleventh Circuit erred in holding that *Metro Broadcasting* requires "mid-level" scrutiny here of the constitutional validity of DOT's regulatory MBE program. The Court in *Metro Broadcasting* applied a "mid-level" constitutional review standard to determine the validity of the Federal Communications Commission's ("FCC") minority preference programs, but only because *Congress itself*, after specific consideration of the racial preference at issue, *mandated* the programs. Justice Brennan, writing for the majority, emphasized that "[i]t is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved — indeed, mandated — by Congress." *Id.* at 3008.

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[5] The Court said:

> [I]t seems to us that the Court has created a dual inquiry for evaluating affirmative action programs. First, we must determine whether a state or local government has developed the program, or whether Congress has authorized the program's creation. If the former, a court must strictly scrutinize the program. That is, the means chosen must be narrowly tailored to achieve a compelling governmental interest. If the latter, however, then an intermediate level of scrutiny is appropriate. The program must serve an important governmental interest and the means must be substantially related to the achievement of that objective. Because Congress authorized the creation of the MBE program contained in the DOT regulations, the district court should have applied an intermediate level of scrutiny in evaluating the regulations.

920 F.2d at 767.

By contrast, it cannot be said in this case that Congress considered, "mandated," or "specifically approved" DOT's regulatory requirement of minority participation goals. Nor did Congress devise, influence, or otherwise play a role in the County's separate choice of a twenty percent minority participation goal. Accordingly, *Metro Broadcasting* provides no authority for the Eleventh Circuit's holding that the instant MBE program should be subject to an intermediate level of scrutiny.

In *Metro Broadcasting*, the majority cited several considerations supporting its approval of "close [judicial] examination" but "appropriate deference" to Congress, "when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress. . . . " 109 S.Ct. at 3008. It pointed, for example, to the fact that Congress is charged by the Constitution with the power to provide for the general welfare and to enforce, by appropriate legislation, the equal protection clause of the Fourteenth Amendment. *Id.*; *Fullilove, supra*, 448 U.S. at 472. Its legislative decisions are therefore accorded "great weight" by the judiciary. *Fullilove, supra*, 448 U.S. at 472. Indeed, it has been said that passing on the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." *Fullilove, supra*, 448 U.S. at 472, *quoting Blodgett v. Holden*, 275 U.S. 142, 148 (1927). The majority further noted that Congress is "a national legislature that stands above factional politics . . . ", *Metro Broadcasting, supra*, 110 S.Ct. at 3009, unlike a state or local body which is subject to greater potential for racial politics. *City of Richmond v. Croson*, 488 U.S. 469, 491 (1989); *Associated General Contractors of California v. City & County of San Francisco*, 813 F.2d 922, 929 (9th Cir. 1987) ("the narrower a government's domain, the greater the likelihood of oppression.").

It was from this perspective that the majority in *Metro Broadcasting* concluded that "race-conscious classifications

adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." 110 S.Ct. at 3009. Citing *Fullilove* as support, the majority observed that there the Court did not employ "strict scrutiny" in approving a minority set-aside program which was "*congressionally* mandated." *Id.*, n.13 (emphasis in original).

These principles have no play in this case, however, since the Eleventh Circuit never found — nor could it have — that *Congress* adopted or mandated the minority-participation preference subject to review. At most, according to the court below, Congress "authorized the [MBE] program's creation" (920 F.2d at 767) in section 30 of the Airport and Airway Development Act of 1970, 49 U.S.C. App. § 2219.[6] While we agree with petitioner that even the Eleventh Circuit's "authorizing" finding assigns too much to the federal statute,[7] accepting that proposition for the moment means simply that Congress empowered the DOT to determine in what circumstances, if any, race-conscious remedial action might be necessary to "remove or overcome the effect of" prior discrimination that had operated to

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[6] The Court interpreted that section as:

> a broad [congressional] delegation of power to the DOT to create regulations necessary to ensure there is no discrimination by recipients of federal funds under the AADA. Second, the statute endorses rules similar to those established under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and those rules condone, and in some cases require, race-conscious regulations and/or action. *See* 49 C.F.R. § 21.5(b)(7).

920 F.2d at 764.

[7] The statute is most fairly read as prohibiting race-conscious preferences. *See* note 4, *supra*. Therefore, as petitioner argues (Pet. at 10-16), it does not authorize DOT's minority participation goal requirement. Rather, it authorizes only non-exclusionary "affirmative action" measures that prefer "no person" on account of "race, creed, color, national origin, or sex . . . " 49 U.S.C. App. § 2219.

exclude individuals on grounds of race, color, or national origin from participation in any DOT program or activity. 49 C.F.R. § 21.5(b)(7).[8] Nowhere does Congress direct the agency to fashion a racial response; nor does the federal legislation contemplate congressional approval of the regulatory scheme adopted. Rather, Congress left such matters as the nature and dimension of whatever affirmative action measures are to be developed wholly to the DOT's discretion — authorizing it to act, we would presume, within constitutional limits.

Both *Metro Broadcasting* and *Fullilove* are in these circumstances of no precedential value here. In *Metro Broadcasting*, the administrative scheme promulgated by the FCC was accorded a measure of deference under the Court's mid-level review standard precisely because, as found by the majority, it was considered, approved — indeed mandated — by Congress. 110 S.Ct. at 3008-3009. Likewise, in *Fullilove*, a plurality of the Court used an intermediate level of review to scrutinize, and by a splintered vote uphold

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[8] Subsection 7 provides:

> (7) This part does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin. Where prior discriminatory practice or usage tends, on the grounds of race, color, or national origin to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage. Even in the absence of prior discriminatory practice or usage, a recipient in administering a program or activity to which this part applies, is expected to take affirmative action to assure that no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin.

against a facial constitutional attack, a minority set-aside program the "critical determinations" of which were made by Congress after due consideration of the merits of the proposed action.[9] 448 U.S. at 468.

Without anywhere near the same degree of congressional focus and direction here, DOT's racial preference program — even assuming authorization from Congress to fashion affirmative action measures, if needed, to remedy prior exclusionary practices — must, by contrast, face the most exacting scrutiny to insure constitutional compliance. Nothing in *Metro Broadcasting*, *Fullilove*, or to our knowledge any other decision of this Court, suggests any lesser judicial vigilance with respect to racial classifications fashioned solely by an administrative agency.[10]

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[9] These "critical determinations" included:

> the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority groups that are to be encompassed by the program; and the provision for an administrative waiver where application of the program is not feasible. Congress relied on the administrative agency to flesh out this skeleton, pursuant to delegated rulemaking authority, and to develop an administrative operation consistent with legislative intentions and objectives.

Fullilove, *supra*, 448 U.S. at 468.

[10] Petitioner makes the point (Pet. at 21-23), which we endorse for the reasons stated, that *Metro Broadcasting* may well have little relevance in the public contracting area even on its own terms, since Justice Stevens has elsewhere expressed reservations that raise doubts about the decision's applicability in this quite different context. *See Croson*, *supra*, 488 U.S. at 512-13 (Stevens, J., concurring). It is, in any event, certainly the case that *Metro Broadcasting* does not relieve Congress or federal agencies of the obligation to ground such programs on specific findings that identify the purpose for classifying by race. Nor does *Metro Broadcasting* suggest any disagreement with *Fullilove*'s general conclusion that in the area of public contracting that purpose must be remedial, aimed at redressing unlawful discrimination. No such findings were ever made by Congress, the DOT or the County here.

B. Strict Scrutiny Is The Appropriate Standard To Review The Constitutionality Of The Transportation Department's MBE Regulations And State Or Local Actions Taken Pursuant Thereto

The instant MBE preference goals allocate a valuable government advantage on the basis of race, color or national origin, to bidders for construction contracts funded with state and federal funds. The preference classifies by race and is therefore presumptively at odds with the guarantee of the Equal Protection Clause of the Fourteenth Amendment.

Croson teaches that a state or local governmental body cannot on its own engage in such race-based classifications, even as "affirmative action," unless it shows a *compelling* need to do so in order to remedy prior identified discrimination that persists despite the use of non-racial corrective measures. *City of Richmond v. Croson, supra*, 488 U.S. at 493. Even then, use of race must be "narrowly tailored" to redress the identified discrimination in a manner that is least intrusive of the rights of innocent third parties. *Id.* at 507-508; *see also Wygant v. Jackson Board of Education*, 476 U.S. 267, 282-84, *reh'g denied*, 478 U.S. 1014 (1986); *Local 28 Sheet Metal Workers International Association v. EEOC*, 478 U.S. 421, 476 (1986); *United States v. Paradise*, 480 U.S. 149, 183-86 (1987). This Court's insistence on "strict scrutiny" of such arrangements to ensure compliance with these requirements is in recognition that a "lower standard signals that the Government may resort to racial distinctions more readily" (*Metro Broadcasting*, 110 S.Ct. at 3033 (O'Connor, J. dissenting)) — a result not to be countenanced.

Indeed, whatever modest running-room might be available to Congress in limited circumstances,[11] the Fourteenth Amendment offers no apparent justification for relaxing the equal protection guarantee otherwise. Certainly, administrative agencies can claim no particular entitlement to constitutional deference. *See* Petition at 20. They do not as a general matter engage in the public debate or act in a representative capacity. Their expertise, such as it is, lies largely within the area of their assigned legislative responsibility, not beyond. And, their geographic frame of reference rarely takes into account the realities of life outside the Nation's Capitol. It is precisely because administrative rulemaking occurs within a sheltered environment, relatively speaking — largely unaccountable to the public for decisions made and undaunted by traditional checks and balances from outside forces — that an

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[11] Section 5 of the Fourteenth Amendment — which grants to Congress alone the enforcement authority of the Amendment's Section 1 (U.S. Const., Amend. XIV) — has been referenced as the basis for permitting greater deference to congressional action that mandates classifications by race. *See Metro Broadcasting, supra,* 110 U.S. at 3008 (Brennan, J.). One can legitimately question how a constitutional authorization to Congress to take whatever action necessary *to enforce* the equal protection guarantee can be read as expanding the Constitution's tolerance for congressional "affirmative action" (in the form of a racial preference) that flies in the face of equal protection. *Id.* at 3045 (Kennedy, J., dissenting).

To date, *Metro Broadcasting* stands alone as support for that seemingly anomalous legal proposition, and, as indicated in note 10, *supra,* it appears to have exceedingly limited application. Since *Fullilove* was a divided opinion, with no justice able to command a majority, its precedential value is negligible. Moreover, the federal statute that survived a facial constitutional challenge in *Fullilove* was saved because its set-aside program was to be applied so as to benefit those minority contractors able to show injury from prior industry discrimination. *See* 448 U.S. at 487-88; *Croson, supra,* 488 U.S. at 489. Thus, the racial preference was tied by Congress to those actually able to demonstrate in an administrative proceeding that they were victimized because of the discrimination — and, thus, if honestly applied, it was in fact no preference at all. *See, e.g., Croson,* 488 U.S. at 526 (Scalia, J., concurring).

emerging racial classification demands the most exacting judicial scrutiny.

Perhaps where Congress mandates a federal agency to allocate resources by race, it is enough to show that the congressional judgment, as administratively implemented, is grounded on a mid-level "substantial government interest." *See Metro Broadcasting, supra*, 110 S.Ct. at 3008-09; *but see* note 10, *supra*. Without the federal legislative mandate, however, the Fourteenth Amendment imposes on all such government action a heightened, "compelling interest" justification, tested under the most intense judicial scrutiny. The Eleventh Circuit erred in holding otherwise.

Indeed, the error here is particularly egregious because Congress left entirely to DOT whether and in what circumstances "affirmative action" measures should be addressed in rulemaking, insisting only on *non*-discrimination. *See* note 7, *supra*. DOT, then, on its own adopted an impermissible racial preference program and insisted as a price of participation in government construction activities that county recipients do likewise. Most assuredly, the county's second-tier racial classification demands *Croson* scrutiny. *Croson, supra*, 488 U.S. at 493-96. Nor has any good reason been offered for being constitutionally less vigilant of the federal administrative program. *Compare Croson*, 488 U.S. at 491, with *Associated General Contractors of California, supra*, 813 F.2d at 929.

CONCLUSION

Accordingly, for the reasons stated, as well as the arguments set forth in the petition, the writ of certiorari should be granted to permit plenary review by this Court of the Eleventh Circuit's erroneous ruling.

Respectfully submitted,

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